TABLE OF CONTENTS

	Page
Opinions & Judgments Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	
1. The decision below provides the Internal Revenue Service with a means of circumventing an act of Congress	5
2. There is a conflict between the decision below of the Ninth Circuit with District Court decisions, at least one of which is on appeal to the Fourth Circuit	10
3. The decision below deprives petitioner of its constitutional rights to due process and free speech and enables the Internal Revenue Service to selectively enforce a Congressional act and its own regulations in a discriminatory fashion	14
Conclusion	17
APPENDIX	

Appendix A:
The order of the United States Court of Appeals for the Ninth Circuit, dated July 7, 1972 i

Appendix B:
The opinion and order of the United States District Court for the Central District of California, dated June 19, 1970 . . . . ii-vi

Appendix C:
Statutory Provisions:
United States Constitution, Article I, Section 1 vii

United States Constitution, Article I, Section 8 vii

United States Constitution, Article V vii

United States Constitution, First Amendment vii

United States Constitution, Fifth Amendment viii

26 U.S.C. §501(c)(3) viii

26 U.S.C. §501(c)(4) ix

Treasury Regulations on Income Tax, §1.501(c)(3)-1(c)(3) ix

28 U.S.C. §1361 xi

28 U.S.C. §2201 xi

5 U.S.C. §702 xi

28 U.S.C. §1346 xii

TABLE OF AUTHORITIES

Cases: Page

Bob Jones University v. Connally, 29 A.F.T.R. 2d 693 (D.S.C., Nov. 17 1971) 11, 12

Bolme v. Nixon (D.C. Mich. 65), 239 F. Supp. 907 13

Coit v. Green, 404 U.S. 997 (1971) . . . 12

Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7; 82 S.Ct. 1125, 1129, 8 L.Ed. 2d 292 (1962) 11, 12

Estate of Sanford v. Commissioner, 308 U.S. 39, 52, 60 S.Ct. 51, 60, 84 L.Ed. 20 (1939) 9

Green v. Connally, 330 F. Supp. 1150 (D.C.D.C., 1970) 12

Green v. Kennedy, 309 F. Supp. 1127 . . 12

Hawke v. Smith, 353 U.S. 221, 229 (1919) 40 S.Ct. 495, 64 L.Ed. 871 6

Helvering v. Credit Alliance Corp., 316 U.S. 107, 113, 62 S.Ct. 989, 992, 86 L.Ed. 1307 (1942) 9

Helvering v. Sabine Transp. Co., 318 U.S. 306, 311-312, 63 S.Ct. 569, 572, 87 L.Ed. 773 (1943) 9

Hollingsworth v. Virginia, 1 L.Ed. 644, 3 Dall. 378 6

Cases (Continued)

Lesser v. Garnett, 114 A. 840, 848, 139 Md. 46 (1921) 6

McGlotten v. Connally, 338 F. Supp. 448, (D. C. D. C., 1972) 10, 11, 12

Pettengill v. U.S., (D. C. Vt. 62) 205 F. Supp. 10 13

Ruby v. Mayer, (D. C. N. J. 61) 194 F. Supp. 595, 594 12

Smith v. Commissioner, 3 T. C. 696 . 15, 16

Sweeney v. King, 137 A. 178, 289 Pa. 92 (1927) 6

Tomlinson v. Smith (7 Cir. 42), 128 F. 2d 808 13

U.S. v. Steele, 461 F. 2d 1148 (1972) 15, 16

Warfield v. Vandiver, 60 A. 538-543, 101 Md. 78, 4 Ann. Cas. 692 (1905) 7

Washington v. U.S., 130 U.S. App. D. C. 374, 401 F. 2d 915 (1968) 15

Wise v. Chandler, 108 S. W. 2d, 1024, 1031, 1033, 270 Ky. 1 (1927) 7

Yick Wo v. Hopkins, 118 U.S. 356, 373-374, 6 S. Ct. 1064, 1073, 30 L. Ed. 220 (1886) 14, 15

Statutes:

5 U.S.C. §702 . . . . . 9, 15

26 U.S.C. §501(c)(3) . . . 3, 4, 5, 6, 9, 11, 16

26 U.S.C. §501(c)(4) 4

26 U.S.C. §501(c)(7) 10

26 U.S.C. §501(c)(8) 10

26 U.S.C. §7421 . . . . . 10, 11, 12

28 U.S.C. §2354(1) 2

28 U.S.C. §1346 . . . . . 3, 15

28 U.S.C. §1361 . . . . . 2, 3, 5, 9, 15

28 U.S.C. §2101(c) 2

28 U.S.C. §2201 . . . . . 2, 4, 5, 11, 12, 13

Treasury Regulations §1.501(c)(3)
-1(c)(3) 4

Miscellaneous:

Blacks Law Dictionary (4th Ed.) 7, 8

Rev. Rul. 58-255, 1958-1, Cum.
Bull. 91 16

Rev. Rul. 71-447, 1971-2 Cum.
Bull. 501 13

In The

Supreme Court of the United States

October Term, 1972

No. _____

Liberty Amendment Committee of the U.S.A., a California corporation,

Petitioners,

VERSUS

United States of America, United States Treasury Department, Internal Revenue Service, Randolph W. Thrower, Commissioner of Internal Revenue of the United States; Frank S. Schmidt, District Director of United States Internal Revenue Service, Los Angeles, California,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Liberty Amendment Committee of the U.S.A., a California corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 7, 1972, affirming judgment of the United States District Court for the Central District of California and dismissing petitioners'

complaint for writ of mandate on the grounds of lack of subject matter jurisdiction.

OPINIONS AND JUDGMENTS BELOW

The order of the United States Court of Appeals for the Ninth Circuit appears in Appendix "A". The opinion and order of the United States District Court, Central District of California, appears in Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 7, 1972. This Court's jurisdiction is invoked under United States Code, Title 28, Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether an administrative agency may utilize its rule-making powers to define "legislation" in a statute as including "constitutional amendment" in the face of court decisions that constitutional amendments are not legislation, and whether mandamus is available to compel the agency officials to comply with the statute rather than the regulation.

2. Whether the limitation in 28 U.S.C. §2201 excluding controversies "with respect to Federal taxes" applies to a party exempt from taxes who is not seeking a refund of taxes nor defending against a tax collection suit but, rather, seeking interpretation of a statute regarding status and the rules and regulations thereunder.

3. Whether the limitation in 28 U.S.C. §2201 excluding controversies "with respect to Federal taxes" from the Court's jurisdiction to render declaratory judgments may be superimposed on an entirely different and subsequent statute, 28 U.S.C. §1361, giving the Courts jurisdiction to

compel administrative officers of the United States Government to perform duties owed.

4. Whether the courts have jurisdiction to prevent an administrative agency from selectively enforcing a statute and regulation in a discriminatory fashion against an organization exercising its First Amendment rights in an attempt to practically eliminate that agency.

STATUTORY PROVISIONS INVOLVED

The following are the constitutional, statutory, and regulatory provisions involved: (Appendix C)

Article I, Section 1, United States Constitution
Article I, Section 8, Clause 1, United States Constitution
Article V, United States Constitution
First and Fifth Amendments to the Constitution of the United States
Title 26, United States Code, §501(c)(3)
Title 26, United States Code, §501(c)(4)
Treasury Regulations on Income Tax, 26 C.F.R. 1.501(c)(3)-1(c)(3)
Title 28, United States Code, §1346
Title 28, United States Code, §1361
Title 28, United States Code, §2201
Title 5, United States Code, §702

STATEMENT OF THE CASE

In the original action involved here, Liberty Amendment Committee of the U.S.A. (Liberty) claimed the Internal Revenue Service deprived Liberty of its constitutional and statutory rights and sought a writ of mandate under 28 U.S.C. §1361, the Constitution of the United States, and 28 U.S.C. §1346 to compel the Commissioner to grant it tax exempt classification under Section 501(c)(3) of the Internal Revenue Code of 1954.

On June 19, 1970, the District Court entered an order granting the Government's motion to dismiss Liberty's complaint on the grounds that the court lacked jurisdiction over the subject matter because 28 U.S.C. §2201, the Declaratory Judgment Act, bars declaratory judgments with respect to taxes. Liberty filed a timely notice of appeal on July 14, 1970. Briefs were filed and the matter was argued before the United States Court of Appeals, Ninth Circuit, on July 5, 1972. On July 7, 1972, the Court of Appeals entered judgment affirming the District Court's dismissal of Liberty's petition on the grounds of lack of subject matter jurisdiction.

Liberty is a nonprofit organization whose activities are directed toward the adoption of a constitutional amendment which would repeal the federal income, estate, and gift taxes. Currently tax exempt under Section 501(c)(4) of the Code (Title 26), Liberty applied for classification under Section 501(c)(3). 1/ Section 501(c)(3) provides tax exempt status for religious, charitable, scientific, literary, or educational organizations, but excludes from exempt status organizations which, as a substantial part of their activities, engage in attempts to influence legislation. Treasury Regulations §1.501(c)(3)-1(c)(3) defines the term "legislation" to include activities directed toward the adoption of a "constitutional amendment".

The Commissioner of Internal Revenue denied Liberty's application for Section 501(c)(3) status on the basis that the term "legislation" included

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1/ Classification under Section 501(c)(3), unlike its present Section 501(c)(4) classification, would enable Liberty to be the recipient of tax deductible contributions. The difference in classification means life or death to Liberty.

"constitutional amendment" and, thereafter, Liberty filed suit in the District Court seeking an action in mandamus under 28 U.S.C. §1361 to compel the Commissioner to classify it under Section 501(c)(3).

The basic issue between the Internal Revenue Service and petitioner revolves around the interpretation of the statute (Internal Revenue Code Section 501(c)(3)) which exempts organizations such as petitioner, unless they attempt to influence "legislation". Petitioner's sole purpose and activity is conceded by the Internal Revenue Service to be in regards to a "constitutional amendment"; however, its regulations interpret such as "legislation", while petitioner contends the court decisions, the United States Constitution, and the dictionary interpret them differently.

The premise of petitioner's suit is that the IRS owes a duty to petitioner, under the statute, to give it a 501(c)(3) classification because it is not attempting to influence "legislation", and, therefore, petitioner brought the action in mandamus under authority of Title 28, U.S.C. §1361.

The premise of the Government's motion to dismiss and the District Court's order is that, in order to hold in favor of petitioner, the Court would have to declare the IRS 501(c)(3) regulation invalid and that, since declaratory judgments with respect to federal taxes are prohibited under Title 28, U.S.C. §2201, therefore, the Court is without jurisdiction and must dismiss the case.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION BELOW PROVIDES THE INTERNAL REVENUE SERVICE WITH A MEANS OF CIRCUMVENTING AN ACT OF CONGRESS

Congress, by statutory enactment, 26 U.S.C.

§501(c)(3), has provided a tax exempt status to certain organizations whereby they are enabled to be the recipients of tax deductible contributions. Excluded from that status by the enactment are organizations which, as a substantial part of their activities engage in attempts to influence legislation. Liberty is a non-profit organization whose sole purpose and activity is conceded by the Internal Revenue Service to be directed toward the adoption of a constitutional amendment which would repeal the federal income, estate, and gift taxes; however, IRS contends it cannot grant that status solely because its regulations (26 C. F. R. 1. 501(c)(3)-1(c)(3)) interprets legislation as including constitutional amendment.

The courts, however, have, without exception where the question has arisen, distinguished the Constitution and its amendment from legislation. As early as the year 1798, in the case of Hollingsworth v. Virginia, 1 L. Ed. 644, 3 Dall. 378, the U. S. Attorney General pointed out distinctions between "ordinary acts of legislation" and the constitution. As was stated by the Supreme Court in Hawke v. Smith, 353 U. S. 221, 229 (1919), 40 S. Ct. 495, 64 L. Ed. 871: " . . . ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word."

The state courts have concurred. See, for example, Lesser v. Garnett, 114 A. 840, 848, 139 Md. 46 (1921) holding that the ratification of an amendment to the federal constitution is not "legislation" within the rules of the Legislature of the State governing its procedure in dealing with legislation. See Sweeney v. King, 137 A. 178, 289 Pa. 92 (1927), holding that a resolution proposing amendment to the state constitution was not void because it was not included in the Governor's proclamation regarding legislation since constitutional amendments are not "legis-

lation".

In the same vein are Wise v. Chandler, 108 S.W. 2d, 1024, 1031, 1033, 270 Ky. 1 (1927) holding that the retification of a proposed amendment to the Federal Constitution by the State Legislature is not "legislation" and does not require any previous proclamation, and Warfield v. Vandiver, 60 A. 538-543, 101 Md. 78, 4 Ann. Cas. 692 (1905) holding that a proposal to amend the constitution is not "legislation" and hence need not be submitted to the governor for his approval.

Blacks Law Dictionary (Fourth Ed.) confirms the courts in their analysis that constitution and legislation are different. Constitution is defined therein as:

> " . . . the written instrument agreed upon by the people of the Union or of a particular state, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or ordinance of any such department or officer is null and void."

Constitutional Law is defined as:

> "That branch of the public law of a state which treats of the organization and frame of government, the organs and powers of sovereignty, the distribution of political and governmental authorities and functions, the fundamental principles which are to regulate the relations of government and subject,

> and which prescribes generally the plan and method according to which the public affairs of the state are to be administered."

On the other hand, "legislation" is described in Blacks as follows:

> "The act of giving or enacting laws; the power to make laws; the act of legislating; preparation and enactment of laws; the making of laws by express decree."

The difference in definition is obvious from the above and, in addition, a philosophical distinction in governmental theory is exemplified by the characterization that:

a. "legislation" involves action by the government to control the people, while

b. "constitutional amendment" involves action by the people to control the government.

Thus, it can be seen that in the face of dictionary, court decision, and the theory of government, IRS has arbitrarily utilized its rule-making power to misdefine and circumvent the clear and plain meaning of a statute.

When this Court has disagreed with interpre-

tive regulations in the past, it has found no difficulty in disregarding them, e.g., in Helvering v. Sabine Transp. Co., 318 U.S. 306, 311-312, 63 S.Ct. 569, 572, 87 L.Ed. 773 (1943), the court stated, "We think the regulations are in the teeth of the unambigous mandate of the statute are contradictory of its plain terms, and amount to an attempt to legislate." And in pushing toward a rejection of the view of the Bureau of Internal Revenue, the Court said in the famous Sanford case that "courts are not bound to accept the administrative construction of a statute regardless of consequences . . . " (Estate of Sanford v. Commissioner, 308 U.S. 39, 52, 60 S.Ct. 51, 60, 84 L.Ed. 20 (1939). In another case, the Court made its own interpretation of the statute and then said that "the regulation not only was contradictory to the plain terms of the subsection but attempted to add a supplementary legislative provision, which could only have been enacted by Congress". (Helvering v. Credit Alliance Corp. 316 U.S. 107, 113, 62 S.Ct. 989, 992, 86 L.Ed. 1307 (1942)).

28 U.S.C. §1361 gives the federal courts jurisdiction to compel agency officials to perform duties owed citizens, and 5 U.S.C. §702 provides that those adversely affected by agency action within the meaning of a relevant statute are entitled to judicial relief. That is exactly what petitioner is asking for, but being deprived of by the courts below. Under the statute (501(c)(3)) IRS owes Liberty a duty and certainly Liberty has been adversely affected by IRS's action in refusing to give it 501(c)(3) status.

The special importance of this "(c)(3)" classification is that these organizations may be the recipient of contributions which constitute tax deductions to the contributor. The Treasury regulations and ruling policy are crucial for these organizations, not so much because of the tax

exemption granted, but because of the deductibility of contributions. As a practical matter, it is virtually impossible to obtain public contributions for an organization which has not received its "exemption certificate", because no individual relishes the prospect of fighting for the organization's exemption in his own income tax examination. The Service, therefore, has life-or-death power over most charities in the exercise of its discretionary ruling policy.

It is respectfully submitted that this Court should grant certiorari and, ultimately, reverse this case to prevent the Internal Revenue Service from circumventing an Act of Congress.

2.

THERE IS A CONFLICT BETWEEN THE DECISION BELOW OF THE NINTH CIRCUIT WITH DISTRICT COURT DECISIONS, AT LEAST ONE OF WHICH IS ON APPEAL TO THE FOURTH CIRCUIT

In McGlotten v. Connally, 338 F. Supp. 448, (D. C., D. C., 1972), a three-judge District Court declined to dismiss an action brought against high Treasury officials by a Negro applicant who had allegedly been denied admission to an Elks Club. The plaintiff had sought an injunction ordering the officials to withdraw the Code Section 501(c)(7) and (8) tax exemptions of the Elks and other clubs which discriminated against Negro applicants. The court ruled (p. 453) that Sections 7421[2/] (the

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2/ Section 7421 (as amended by Section 110(c), Federal Tax Lien Act of 1966, P. L. 89-719, 80 Stat. 1125) provides in pertinent part that " * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such

Tax Anti-Injunction Law) and 2201 did not apply where the plaintiff "does not contest the amount of his own tax, nor * * * seek to limit the amount of tax revenue collectible by the United States ***[and the] preferred course of raising his objections in a suit for refund is not available".

The McGlotten court considered the Declaratory Judgment Act (28 U.S.C. §2201) and the Tax Injunction Act (26 U.S.C. 7421(a)) co-terminous and rejected the government's contention that they took away the court's jurisdiction, citing, at one point, the Supreme Court in Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7; 82 S.Ct. 1125, 1129, 8 L.Ed. 2d 292 (1962) that the literal terms of the statute do not apply when the "central purpose of the Act is inapplicable".

The government has informed counsel for petitioner that it will give serious consideration to appealing the McGlotten case after a final judgment is entered in the case, but due to time factors, counsel has not been able to determine the present status thereof.

In Bob Jones University v. Connally, 29 A.F.T.R. 2d 693 (D.S.C., Nov. 17, 1971), the court issued a preliminary injunction restraining the Treasury from withdrawing the tax exemption and deductibility assurance rulings under 501(c)(3) of a private school having a racially discriminatory admissions policy. The government in that case as in the instant case, contended the court did not have jurisdiction because of the Declaratory Relief Act (2201). In rejecting that claim, the court stated, " . . . it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or

2/ (Continued)

person is the person against whom such tax was assessed."

method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due."

In rejecting the government's contention that the anti-injunction statute also took away jurisdiction from the court, the Jones court, like McGlotten (supra) cited the Supreme Court in Enochs (supra).

Petitioner is informed the Jones case is currently on appeal to the Court of Appeals for the Fourth Circuit (No. 72-1075).

Another District Court case in conflict with the instant case is Green v. Kennedy, 309 F. Supp. 1127 (preliminary injunction opinion) and Green v. Connally, 330 F. Supp. 1150 (D. C. D. C., 1970) (declaratory judgment and final injunction opinion). Green was an action, brought by Mississippi parents and children, to obtain declaratory and injunctive relief requiring the Treasury to withdraw the tax exempt status and deductibility assurance rulings of white segregated private schools from which Negroes were excluded. The Treasury opposed the issuance of the final judgment on the basis, inter alia, of the Section 7421 Anti-Injunction Law and the Section 2201 Declaratory Judgment Act prohibitions. Although the District Court did not mention either statute in its opinion, it took jurisdiction. Meantime, the Treasury had voluntarily changed its policy to deny tax exempt status to such schools,[3/] and did not appeal the decision; however, a class of white parents and children who had intervened in the suit did appeal, and the Supreme Court affirmed the judgment in a per curiam one-sentence order (Coit v. Green, 404 U.S. 997 (1971).

The trial court in our instant case concedes that petitioner "is neither seeking a refund of taxes nor defending against a tax collection suit by the government" (Appendix B). Thus, it is apparent that petitioner maintains this case, not

as a taxpayer seeking relief to avoid the paying of a tax, but as a third party, who would receive tax-free donations from taxpayers. The jurisdiction of the Court is invoked, not for declaratory judgment with respect to taxes; but for mandamus with respect to the status of petitioner under a Treasury Regulation that has been illegally established in violation of the duty owed to petitioner.

It has been uniformly recognized that statutes inhibiting declaratory judgment and injunction suits in tax cases apply only to the taxpayer . . . not to third parties. Bolme v. Nixon[4/] (D. C. Mich. 65), 239 F. Supp. 907; Tomlinson v. Smith, (7 Cir. 42), 128 F. 2d 808[5/]; Pettengill v. U. S. (D. C. Vt. 62) 205 F. Supp. 10; Ruby v. Mayer (D. C. N. J. 61) 194 F. Supp. 595.

Petitioner's right to equal protection of the law has been effectively denied by a decision that petitioner could proceed only under declaratory judgment, or by paying the tax, under protest and then suing for its recovery. Such tax is not payable by petitioner, but by donors; and a deci-

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3/ Rev. Rul. 71-447, 1971-2 Cum. Bull. 501; originally IRS News Release dated July 10, 1970, 1970 C. C. H. Stand. Fed. Tax. Rep., par. 6790.

4/ "Since this is a suit for a permanent injunction, defendant's objection that 28 U. S. C. §2201, the declaratory judgment statute, forbids the suit, is not persuasive. Ruby v. Mayer, 194 F. Supp. 594 (D. C. N. J. 1961)"

5/ " . . . it is our view that the language which excepts federal taxes from the Declaratory Judgment Act is co-extensive with that which precludes the maintenance of suit for the purpose of restraining the assessment or collection of a

sion that petitioner can proceed only through a third party has effectively denied petitioner the right of judicial review of the administrative amendment by the Treasury of an act of the congress.

In view of the above and the conflict in the cited cases with the instant case, one of which is on appeal in another circuit, this Court should grant certiorari to resolve the conflict, as well as to settle the questions of whether the Declaratory Judgment Act can be superimposed on the subsequent Mandamus Statute and whether the Declaratory Judgment Act applies to a party exempt from taxes who is not seeking a refund of taxes nor defending against a tax collection suit.

3.

THE DECISION BELOW DEPRIVES PETITIONER OF ITS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FREE SPEECH AND ENABLES THE INTERNAL REVENUE SERVICE TO SELECTIVELY ENFORCE A CONGRESSIONAL ACT AND ITS OWN REGULATIONS IN A DISCRIMINATORY FASHION

Equal protection of the law is denied when state officials enforce a valid statute in a discriminatory fashion.

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct.

5/ (Continued)
tax. It applies to a suit by a taxpayer, but not to a suit by a third party seeking to protect a lien claimed to be superior to that of the Collector, as in the instant case."

1064, 30 L. Ed. 220 (1886)

The Due Process Clause of the Fifth Amendment furnishes the same guarantee against federal discrimination.

Washington v. U.S., 130 U.S. App. D.C. 374, 401 F. 2d 915 (1968)
U.S. v. Steele, 461 F. 2d 1148 (1972)

Title 28, U.S.C., §1346 provides for jurisdiction in district courts in any civil action against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, and as indicated supra herein, 28 U.S.C. §1361 gives the Federal courts jurisdiction to compel agency officials to perform duties owed, and 5 U.S.C. §702 provides that those adversely affected by agency action within the meaning of a relevant statute are entitled to judicial relief.

Certainly, in view of the Constitution and the above decisions and statutes, the federal courts have jurisdiction to correct the selective and discriminatory enforcement of statutes and regulations by the Internal Revenue Service. Liberty expects to show that IRS deliberately amended its regulation in 1959 (Federal Register, June 26, 1959) to include constitutional amendment within the definition of legislation to head off the Liberty Amendment Committee which had recently (Feb. and May, 1959) gotten two states to ratify its constitutional amendment (specifically aimed at IRS through repeal of the federal income, estate, and gift taxes). In fact, prior to 1958, the year Liberty was crystalizing out of the American Progress Foundation, the Commissioner had acquiesced in a 1944 decision of the Tax Court (Smith v. Commissioner, 3 T.C. 696) which was based on the stated principle that a constitutional amendment was not "legislation" within the mean-

ing of the regulations. The Commissioner did not withdraw his acquiesence to Smith until 1958 (Rev. Rul. 58-255, 1958-1 Cum. Bull. 91), when Liberty was forming and then amended its regulation when Liberty showed signs of success in 1959.

It would appear that IRS was deliberately trying to destroy Liberty through its rule-making powers and classification procedure because adoption of the committee's program would eliminate the income tax and, thereby, threatens the power and very existence of IRS with its huge bureaucracy.

As was said in Yick Wo long ago:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886).

And, as has been pointed out more recently, a procedure which focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen are being punished for their expression of ideas, a constitutionally protected right under the First Amendment (U.S. v. Steele, 461 F. 2d 1148 (9th Cir., 1972). Liberty also expects to show that there are many organizations classified 501(c)(3) by IRS which, as a substantial part of their activities attempt to influence legislation. But then, of course, they are not aimed at eliminating the income tax.

It is respectfully submitted that this Court should grant certiorari and ultimately reverse

this case to prevent the Internal Revenue Service from depriving petitioner of its constitutional rights of equal protection, due process, and freedom of speech.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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September, 1972

APPENDIX

APPENDIX A

LIBERTY AMENDMENT COMMITTEE OF THE U.S.A., a California corporation,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, RANDOLPH W. THROWER (now JOHNNIE M. WALTERS), Commissioner of Internal Revenue of the United States; FRANK S. SCHMIDT, District Director of United States Internal Revenue Service, Los Angeles, California,
Defendants-Appellees.

No. 26507
United States Court of Appeals
For the Ninth Circuit
July 7, 1972

On Appeal from the United States District Court for the Central District of California

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Before: CHAMBERS, KILKENNY and CHOY, Circuit Judges.

PER CURIAM:

The order of the district court dismissing the petition for mandamus is affirmed.

We find a lack of subject matter jurisdiction

APPENDIX B

LIBERTY AMENDMENT COMMITTEE OF THE U. S. A., a California corporation, Plaintiff,

v.

UNITED STATES OF AMERICA, et al., Defendants.

Civil No. 70-721-HP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

June 19, 1970

ORDER GRANTING MOTION TO DISMISS

On April 24, 1970, defendants filed their motion to dismiss plaintiff's complaint for a writ of mandate. The matter came on for hearing on June 15, 1970. Pursuant to Rule 3(d) of the Local Rules, the motion was submitted for the Court's decision following oral argument.

Plaintiff is a non-profit corporation whose purpose is to promote the adoption of a constitutional amendment which would, inter alia, repeal the federal income, estate, and gift taxes. Currently tax exempt under 26 U. S. C. §501(c)(4), plaintiff seeks a mandatory injunction ordering defendants to eliminate from the Treasury Regulations under §501(c)(3) all language indicating that the term "legislation" includes action involving a constitutional amendment and ordering defendants to grant plaintiff tax exempt status under §501(c)(3).

[APPENDIX]

26 U.S.C. §501(c)(3) provides tax exempt status for religious, charitable, scientific, literary, or educational organizations but excludes from such status organizations which, as a substantial part of their activities, engage in attempts "to influence legislation". Treas. Reg. §1.501(c)(3)-1(c)(3) provides that "legislation" includes action by the Congress or any state legislature involving a constitutional amendment. Since plaintiff's activity is concerned with securing the adoption of a constitutional amendment, the I.R.S. had denied plaintiff tax exempt status under §501(c)(3).

Defendants have moved to dismiss the complaint on the grounds that the Court lacks jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted.

As a basis for the Court's jurisdiction over this action, plaintiff cites 28 U.S.C. §§1346 and 1361. Section 1346, the Tucker Act, does not authorize suits where only declaratory or other equitable relief is sought; rather, it applies only to suits for recovery of money damages. Wells v. U.S., 280 F. 2d 275 (9th Cir. 1960). Since plaintiff's suit seeks a mandatory injunction and, in effect, a declaratory judgment, §1346(a)(2), the subsection invoked by plaintiff, is not applicable. 1/

Section 1361, upon which plaintiff apparently places primary reliance, grants the district court jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any United States Agency to perform a duty owed to plaintiff. In the present case, plaintiff contends that the I.R.S. has a duty to grant plaintiff tax exempt status.

Despite plaintiff's contention, no duty is owed to plaintiff unless the Treasury Regulations under §501(c)(3) are incorrect interpretations of the act.

[APPENDIX]

In the context of this case, where plaintiff is neither seeking a refund of taxes nor defending against a tax collection suit by the government, a determination that the Regulations are invalid could only be by means of a declaratory judgment. However, 28 U.S.C. §2201, the Declaratory Judgment Act, specifically excludes from its purview any case with respect to federal taxes. Since federal tax controversies are expressly excluded from the statute, the Court has no jurisdiction to make the determination which plaintiff requests. See Mitchell v. Riddell, 402 F. 2d 842 (9th Cir. 1968); Jolles Foundation v. Moysey, 250 F. 2d 166 (2d Cir. 1957).

In view of the above, the Court concludes that plaintiff's suit is premature and the relief requested falls outside the Court's jurisdiction. Hence, defendants' motion will be granted.

Because of the Court's ruling granting the motion to dismiss, it is unnecessary to consider the merits of plaintiff's claim for tax exemption. Nevertheless, a few comments on plaintiff's argument are appropriate.

Plaintiff contends that the term "legislation" should be strictly interpreted to include only statutory law. Plaintiff cites numerous cases for the proposition that legislation is distinct from constitutional amendment. Since it is concerned only with amending the Constitution, plaintiff argues that the excluding language of §501(c)(3) is not applicable.

When viewed in the light of the manifest purpose of the exclusion in §501(c)(3), plaintiff's argument is not very persuasive. Broadly read, the term "legislation" would comprehend law of both statutory and constitutional nature. This broad construction would better serve the Congressional purpose in denying tax exemption to

organizations "carrying on propaganda, or otherwise attempting, to influence legislation". In denying tax exemption to such organizations, the intent of Congress was to deny tax subsidies to lobbyists, or, put another way, to deny special benefits through tax exemption to organizations seeking to secure their objectives through the enactment of law. There is little difference involved in lobbying activity designed to promote the passage of statutory law and lobbying activity aimed at the adoption of constitutional law.

Similarly, to an organization seeking to codify its economic objectives or philosophical goals, the ratification of a constitutional amendment is certainly no less palatable than the passage of a statute. If Congress intended to deny tax exemption to an organization whose efforts were directed toward the latter, it cannot be doubted that like treatment was intended for organizations actively seeking the former.

IT IS ORDERED that defendants' motion to dismiss is granted and the complaint and action are hereby dismissed.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order, by United States mail, upon the attorneys of record for the parties appearing in this cause.

Dated: June 19, 1970.

HARRY PREGERSON

Harry Pregerson
United States District Judge

[APPENDIX]

FOOTNOTE

1. Plaintiff denies that it is seeking declaratory relief; nevertheless, a declaration that plaintiff is entitled to tax exempt status would be prerequisite to the issuance of a mandatory injunction. Cf. In re Inland Gas Corp., 241 F. 2d 374, 378 (6th Cir. 1957).

APPENDIX C

United States Constitution, Article I, Section 1:

> "All legislative powers herein granted shall be vested in a Congress of the United States, . . . ".

United States Constitution, Article I, Section 8:

> "The Congress shall have power to lay and collect taxes, . . . ".

United States Constitution, Article V:

> "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing Amendments, which, in either case, shall be valid as to all intents and purposes as part of this Constitution, when rat fied by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one, or the other mode of ratification may be proposed by the Congress; . . . ".

First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[APPENDIX]

Fifth Amendment to the United States Constitution:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ".

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 501 [as amended by Sec. 101(j), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487]. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) Exemption From Taxation. -- An organization described in subsection (c) or (d) or section 401 (a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

* * *

(c) List of Exempt Organizations. -- The following organizations are referred to in subsection (a):

* * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying

on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§1.501(c)(3)-1 Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

* * *

(c) Operational Test -- (1) Primary Activities. An organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so re-

garded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

* * *

(3) "Action" organizations. (i) An organization is not operated exclusively for one or more exempt purposes if it is an "action" organization as defined in subdivisions (ii), (iii), or (iv) of this subparagraph.

(ii) An organization is an "action" organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. For this purpose, an organization will be regarded as attempting to influence legislation if the organization --

(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or

(b) Advocates the adoption or rejection of legislation.

The term "legislation", as used in this subdivision, includes action by the Congress, by any State legislature, by any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation.

* * *

[APPENDIX]

28 U.S.C.:

§1361 [as added by Sec. 1(a), Act of October 5, 1962, P.L. 87-748, 76 Stat. 744]. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

§2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

5 U.S.C.:

§702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

[APPENDIX[

28 U.S.C.:

§1346.

(a) The district courts shall have original jurisdiction, . . . of: . . .

(2) Any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, ...

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and Regulations involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

Americans United v. *Thrower*, 27 A.F.T.R. 2d 884	8
Bob Jones University v. *Connally*, 341 F. Supp. 277	7
Cammarano v. *United States*, 358 U.S. 498	8, 9
Christian Echoes Nat. Ministry, Inc. v. *United States*, 28 A.F.T.R. 2d 5934, appeal dismissed, 404 U.S. 561	6
Crenshaw County Private School Foundation v. *Connally*, 343 F. Supp. 495	8
Enochs v. *Williams Packing Co.*, 370 U.S. 1	6
Filipowicz v. *Rothensies*, 31 F. Supp. 716	6
Green v. *Connally*, 330 F. Supp. 1150, affirmed *per curiam sub nom. Coit* v. *Green*, 404 U.S. 997	6
Israelite House of David v. *Holden*, 14 F. 2d 701	8
Jolles Foundation v. *Moysey*, 250 F. 2d 166	8
Kyron Foundation, Inc. v. *Dunlap*, 110 F. Supp. 428	8
Louisiana v. *McAdoo*, 234 U.S. 627	7
McClintock-Trunkey Co. v. *Commissioner*, 19 T.C. 297, reversed, 217 F. 2d 329	9
McGlotten v. Connally, 338 F. Supp. 448	6, 7
Mitchell v. *Riddell*, 402 F. 2d 842, appeal dismissed and certiorari denied, 394 U.S. 456	8
Mosby Hotel Co. v. *Commissioner*, P-H Memo T.C., par. 54,288	9
National Council on the Facts of Overpopulation v. *Caplin*, 224 F. Supp. 313	8
Old Mission P. Cement Co. v. *Commissioner*, 69 F. 2d 676, affirmed, 293 U.S. 289	9
Penney Co., J.C. v. *United States Dept. of Treasury*, 319 F. Supp. 1023, affirmed, 439 F. 2d 63, certiorari denied, 404 U.S. 869	7

Cases (continued):

	Page
Revere Racing Assn. v. *Scanlon*, 232 F. 2d 816	9
Slee v. *Commissioner*, 42 F. 2d 184	8
Smith v. *Commissioner*, 3 T.C. 696	9
Tomlinson v. *Smith*, 128 F. 2d 808	6
Washburn v. *Commissioner*, 283 F. 2d 839	9

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 170	9
Sec. 170(c)	4, 6
Sec. 162	9
Sec. 501	9
Sec. 501(c)	3, 4, 6, 8
Sec. 3101(a)	6
Sec. 3121(b)	6
Sec. 3121(k)	6
Sec. 7421	2, 5, 6, 8
Sec. 7421(a)	2
28 U.S.C.:	
Sec. 1346	3, 7
Sec. 1361	3, 7
Secs. 2201-2202	5
Sec. 2201	2
Sec. 2202	3

Miscellaneous:

Federal Rules of Civil Procedure, Rule 8(a)	7
Rev. Rul. 58-255, 1958-1 Cum. Bull. 91	9
S. Rep. No. 1005, 73d Cong., 2d Sess., p. 6	5
Treasury Regulations on Income Tax (26 C.F.R.):	
§ 1.501(c)(3)-1	2, 3, 4, 8
§ 1.170-1	4

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-545

LIBERTY AMENDMENT COMMITTEE OF THE U.S.A., a California corporation, PETITIONER

v.

UNITED STATES OF AMERICA, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, RANDOLPH W. THROWER (now JOHNNIE M. WALTERS), Commissioner of Internal Revenue of the United States; FRANK S. SCHMIDT, District Director of United States Internal Revenue Service, Los Angeles, California

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A, p. i) and the district court (Pet. App. B, pp. ii-vi) have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1972. The petition for a writ of certiorari was filed on October 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether a mandamus suit by a nonprofit organization seeking to require the Treasury Department to reinstate rulings recognizing its tax-exempt status and its eligibility for tax deductible contributions is prohibited by Section 7421 of the Internal Revenue Code of 1954 and by the Declaratory Judgment Act.

2. Whether Section 1.501(c)(3)-(1)(c)(3) of the Treasury Regulations on Income Tax (1954 Code), which applies the statutory prohibition on lobbying by exempt educational organizations to organizations which promote constitutional amendments, is valid.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax.*—Except as provided in sections 6212 (a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.
>
> * * *

28 U.S.C.:

> § 2201. *Creation of remedy.*
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any

court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

In addition, the pertinent portions of Section 501 (c)(3) and (4) of the Internal Revenue Code of 1954, Section 1.501(c)(3)-1(c)(3) of the Treasury Regulations on Income Tax (1954 Code), and 28 U.S.C., Sections 1346 and 1361, are set forth in the appendix to the petition.

STATEMENT

Petitioner is a nonprofit organization whose activities are directed toward the adoption of an amendment to the United States Constitution which would repeal the federal income, estate and gift taxes. Prior to and at the time of the filing of this suit, petitioner was exempt from income tax under Section 501(c)(4) of the Internal Revenue Code of 1954. (Pet. App. B, p. ii.)[1] Petitioner brought this mandamus action seeking

[1] Section 501(c)(4) applies to—

Civic leagues or organizations not organized for profit but

an order compelling the United States and Treasury officials to issue a ruling recognizing its tax-exempt status under Section 501(c)(3),[2] rather than Section 501(c)(4). Contributions to Section 501(c)(3) organizations are tax deductible by their donors under Section 170(c)(2)(B). An organization does not qualify as a Section 501(c)(3) organization—and hence donors are not entitled to tax deductions—if the organization is engaged in "carrying on propaganda, or otherwise attempting, to influence legislation". Section 1.501 (c)(3)-1(c)(3) of the Treasury Regulations on Income Tax (1954 Code) (Pet. App. C, p. x) defines "legislation" as including activities directed toward the adoption of a constitutional amendment.[3]

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operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

[2] Section 501(c)(3) applies to—

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[3] This definition contained in Section 1.501(c)(3)-1(c)(3) is made applicable to Code Section 170(c)(2)(B) by Section 1.170-1(f)(2) of the Treasury Regulations.

The district court dismissed petitioner's mandamus action for lack of jurisdiction, holding that the suit in reality sought a declaratory judgment with respect to federal taxes which was barred by the prohibition in the Declaratory Judgment Act, 28 U.S.C. 2201-2202, *supra,* pp. 2-3. (Pet. App. B, pp. ii-iv.) The court of appeals, in a short *per curiam* order, affirmed the dismissal for "lack of subject matter jurisdiction." (Pet. App. A, p. i.)

ARGUMENT

The decision below is correct. There is no conflict among the courts of appeals or other reason for review.

1. Section 7421 of the Internal Revenue Code, *supra,* p. 2, prohibits, with exceptions not here relevant, any suit "for the purpose of restraining the assessment or collection of any tax." The Declaratory Judgment Act, *supra,* pp. 2-3, similarly prohibits declaratory judgment actions "with respect to Federal taxes." The legislative history of the latter statute indicates that the quoted language was designed to prohibit mandamus and injunctive relief in aid of a declaration of rights in a suit with respect to federal taxes. S. Rep. No. 1005, 73d Cong., 2d Sess., p. 6. The purpose of both statutes is to permit the United States to assess and collect taxes alleged to be due without judicial intervention. These statutory prohibitions may be circumvented only if it is shown (1) that "under no circumstances" can the Government prevail on the merits, and (2) that the taxpayer will sustain irreparable injury

for which there is no adequate remedy at law. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 6-7.[4]

Faced with the burden of meeting both requirements, petitioner has satisfied neither. Petitioner has an adequate remedy at law for obtaining tax-exempt status under Section 501(c)(3) and eligibility for tax deductible contributions under Section 170(c)(2). It appears likely that petitioner may litigate these rights itself in a refund action to recover Social Security taxes, for which it would not be liable if it had a tax exemption ruling under Section 501(c)(3).[5] In any event the rights to those rulings may be litigated in a legal action by arranging for one of petitioner's benefactors to challenge, in a Tax Court or refund suit, the disallowance of his contribution as a deduction.

Nor is there a conflict, as petitioner asserts, between this case and the cases of *Green* v. *Connally*, 330 F. Supp. 1150 (D.C.D.C.), affirmed *per curiam* on the issue of denial of intervenor appeal *sub nom. Coit* v. *Green*, 404 U.S. 997, and *McGlotten* v. *Connally*, 338

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[4] Although *Williams Packing* dealt only with the Section 7421 prohibition, the courts have uniformly held that a declaratory judgment action with respect to federal taxes is barred to the same extent that a tax injunctive suit is precluded under Section 7421. *Tomlinson* v. *Smith*, 128 F. 2d 808, 811 (C.A. 7); *Filipowicz* v. *Rothensies*, 31 F. Supp. 716 (E.D. Pa.); *McGlotten* v. *Connally*, 338 F. Supp. 448, 453-454 (D.C.D.C.).

[5] Taxpayers exempt under 501(c)(3) are exempt from Social Security taxes, unless they elect to pay the tax pursuant to Section 3121(k)(1)(A), while those exempt under 501(c)(4) are not exempt from Social Security taxes (Sections 3101(a), 3121(b)(8)(B)). Cf. *Christian Echoes Nat. Ministry, Inc.* v. *United States*, 28 A.F.T.R. 2d 5934 (N.D. Okla.), appeal dismissed on jurisdictional grounds, 404 U.S. 561, where a similar procedure was used.

F. Supp. 448 (D.C.D.C.).[6] Those cases involved class actions by black persons seeking to require the Treasury Department to change its rulings with respect to *other* taxpayers so as to raise the amount of taxes collected from them. While we do not believe injunctions or declaratory judgments were proper in those circumstances,[7] the situation here is substantially different since petitioner seeks reinstatement of its own favorable tax rulings, and, unlike the non-taxpayer complainants in those cases, has an adequate remedy at law.

It is true that the instant decision is capable of a construction that conflicts with the views about the applicability of the Declaratory Judgment Act prohibition expressed by the district court in *Bob Jones University* v. *Connally*, 341 F. Supp. 277 (S. Car.).[8] But the *Bob Jones University* case is presently on appeal

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[6] The *McGlotten* opinion was issued in response to the government's motion to dismiss. No judgment has been entered, and the case is pending in the district court awaiting completion of discovery.

[7] See, *e.g.*, *Louisiana* v. *McAdoo*, 234 U.S. 627.

[8] It is not clear whether the court of appeals below meant to affirm the holding of the district court with respect to the application of the Declaratory Judgment Act prohibition, or whether its holding was that petitioner had failed to allege in its Complaint the statutory basis for the district court's jurisdiction, as required by Rule 8(a) of the Federal Rules of Civil Procedure. Jurisdiction is not granted by 28 U.S.C. 1346, since this is not a suit for refund of taxes paid. The lower court's jurisdiction is not supported by 28 U.S.C. 1361, since that statute is not an independent grant of jurisdiction to the district courts. *J.C. Penney Co.* v. *United States Dept. of Treasury*, 319 F. Supp. 1023, 1030 (S.D.N.Y.), affirmed, 439 F. 2d 63 (C.A. 2), certiorari denied, 404 U.S. 869. These were the only jurisdictional statutes cited in the Complaint.

(to the Fourth Circuit), as are other cases involving the same jurisdictional issue where relief was denied and suits were dismissed. *Americans United* v. *Thrower*, 27 A.F.T.R. 2d 884 (D.C.D.C.), on appeal (C.A. D.C.), and *Crenshaw County Private School Foundation* v. *Connally*, 343 F. Supp. 495 (M.D. Ala.), on appeal (C.A. 5). If these cases are decided in the government's favor on appeal, there will be no appellate conflict with respect to the interpretation of Section 7421 and the Declaratory Judgment Act. Consequently, review by this Court of the instant case would be premature and unwarranted.*

2. In any event, there is no merit to petitioner's contention that Section 1.501(c)(3)-1(c)(3) of the Treasury Regulations, which defines "legislation" as used in Section 501(c)(3) to include activities in support of a constitutional amendment, is invalid. On the contrary, this Court considered the Regulation in *Cammarano* v. *United States*, 358 U.S. 498, 512, and, quoting with approval language from *Slee* v. *Commissioner*, 42 F. 2d 184, 185 (C.A. 2), agreed that it makes "explicit the conclusion * * * that 'political agitation as such is outside the statute, however innocent the aim. . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.'" Activities in support of a constitutional

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* The same issue was also decided favorably to the government in *Jolles Foundation* v. *Moyscy*, 250 F. 2d 166 (C.A. 2); *Mitchell* v. *Riddell*, 402 F. 2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456; *National Council on the Facts of Overpopulation* v. *Caplin*, 224 F. Supp. 313 (D.C.D.C.); *Kyron Foundation, Inc.* v. *Dunlap*, 110 F. Supp. 428 (D.C.D.C.); *Israelite House of David* v. *Holden*, 14 F. 2d 701 (W.D. Mich.).

amendment are no less political than those in support of legislation; under *Cammarano*, agitation for legislative and constitutional changes should be treated identically for tax purposes.

The issue in *Cammarano* was whether activities in support of an initiative fell within the lobbying proscriptions of predecessors to Sections 162, 170 and 501 of the 1954 Code. Other cases considering the same or similar questions have uniformly concluded that activities directed toward constitutional amendments, initiatives and referendums fall within the term "legislation" as it is used in the Code. See *Mosby Hotel Co.* v. *Commissioner*, P-H Memo T.C., par. 54,288 (constitutional amendment); *Old Mission P. Cement Co.* v. *Commissioner*, 69 F. 2d 676 (C.A. 9), affirmed on other issues, 293 U.S. 289 (referendum); *Revere Racing Assn.* v. *Scanlon*, 232 F. 2d 816 (C.A. 1); *Washburn* v. *Commissioner*, 283 F. 2d 839 (C.A. 8) (referendum); *McClintock-Trunkey Co.* v. *Commissioner*, 19 T.C. 297, reversed on other issues, 217 F. 2d 329 (C.A. 9) (initiative).[10]

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[10] Petitioner is not helped by *Smith* v. *Commissioner*, 3 T.C. 696. There the Tax Court first held that a constitutional amendment was not legislation. For a short while, the Commissioner acquiesced in that decision. The Tax Court thereafter changed its position in *Mosby Hotel Co.* v. *Commissioner*, *supra*, and the Commissioner withdrew his acquiescence. Rev. Rul. 58-255, 1958-1 Cum. Bull. 91. See, also, *Cammarano* v. *United States*, *supra*, p. 507, fn. 10.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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